TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 796.

THE UNITED STATES, APPELLANT,

vs.

McDONOUGH'S LEGATEES, THE CITIES OF NEW ORLEANS AND BALTIMORE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED OCTOBER 1, 1878.

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1 District Court of the U. S., District of Louisiana.

No. 24, New Land Docket.

McDONOUGH'S LEGATEES *vs.* THE UNITED STATES. } Petition filed 9 Nov'ber, 1872.

To the honorable the judge of the District Court of the United States for the District of Louisiana.

The petition of the cities of New Orleans and Baltimore respectfully shows:

That your petitioners are political corporations incorporated, the former by the legislature of the State of Louisiana and the latter by the legislature of the State of Maryland; that under the will of the late John McDonough they are the joint proprietors each for
2 one undivided half of a certain unconfirmed land claim hereinafter described; that the said John McDonough died at New Orleans, on the 26th of October, 1850, leaving an olographic will bearing date on the 29th of December, 1838, which was duly filed, probated, and ordered to be executed on the 28th of October, 1850, by the judge of the then 5th district, wherein the succession of the said McDonough was opened, and that your petitioners were thereby instituted the universal legatees by said will, which reads:

"I give, will, and bequeath all the rest, residue, and remainder of my estate, real and personal, present and future, as well that which is now mine as that which may be acquired by me hereafter at any time previous to my death and of which I may die possessed,
3 of whatever nature it may be and wherever situate, subject to the payment of the several annuities or sums of money hereinafter directed and set forth, which said annuities or sums of money are to be paid by the devisees of this my general estate, unto the mayor, aldermen, and inhabitants of New Orleans (my adopted city), in the State of Louisiana, and the mayor, aldermen, and inhabitants of Baltimore (my native city), in the State of Maryland, and their successors (in equal proportion of one-half to each of said cities of New Orleans and Baltimore) forever."

That among the tracts of land so inherited by petitioners from the said McDonough, was a plantation or tract of land situated in the former Spanish province of West Florida, bounded by lands of Geronimo Lachiapella and by vacant lands, containing 2,100
4 superficial arpents, which were sold by Philip Robinson to the late John McDonough and Shepherd Brown, by deed executed on the 12th of November, 1804, before and attested by Thomas Estevan, the commandant of the Spanish post wherein said land was situated.

That said land is more fully described in the petition of the said Philip Robinson to the said Thomas Estevan, commandant of the post of Galveston, on the 20th of January, 1804, wherein said petitioner exposed that he was then and had been in possession of said

tract of land as a vacherie or stock farm, since 1797, with the permission of the predecessors of said commandant, but that said title had unfortunately been destroyed by fire in the house of the petitioner, and that the limits of said land were more properly described in the plan annexed to said petition.

5 That on said petition of Robinson said commandant made the order which, when translated into English, is of the following purport:

GALVESTON, 20 *Jan'y*, 1804.

This party may continue in possession of the land settled with the permission of my predecessor, and will present himself to the intendancy-general to obtain his proper titles.

THOMAS ESTEVAN.

That in obedience to an act of Congress of April 25, 1812, the said title was recorded in the office of the commissioner to ascertain title to lands west of Pearl river; that James O. Cosby, the said commissioner, reported thereon, by classing the same as claim No. 306, under his class B, embracing the claims which, in the opinion of the commissioner, ought to be confirmed, as appears from the American State Papers, Public Lands, Duff Green's edition, vol. iii., p. 53, a certified copy whereof is hereto annexed and marked C.

6 That on the 17th of June, 1844, Congress passed an act entitled an act for the adjustment of land claims within the States of Missouri, Louisiana, and Arkansas, giving jurisdiction to the U. S. district courts within said states over certain land claims, subject to an appeal to the Supreme Court of the U. S.

That under the authority of said act the said John McDonough, who in the meantime had acquired all the rights of the said Shepherd Brown in the said lands, instituted suit in the U. S. district court of this district, on the 15th of June, 1846, in which he claimed the confirmation of said title, and which is suit No. 41 of the docket of land suits instituted under the aforesaid act. That in the petition filed in said suit he alleges that the said title had been

7 acknowledged or confirmed to the extent of 1,280 acres, but that he was unwilling to accept said partial confirmation, and therefore sued for the confirmation of the whole title.

That in said suit judgment was rendered by the U. S. district court, on the 30 of May, 1849, in favor of plaintiff, confirming the whole title of said land as claimed by him.

That an appeal having been taken from said decision to the Supreme Court of the U. S., the said judgment of the district court was reversed, upon the ground set forth in the decision of the Supreme Court of the U. S. in the case of the United States vs. Reynes, reported in 9th Howard's Reports.

Petitioners further show that on the 22 June, 1860, the Congress of the U. S. passed an act entitled "An act for the final ad-

8 justment of private land claims in the States of Florida,

Louisiana, and Missouri, and for other purposes," by the terms of which the district courts of the U. S. in said states were permitted to take cognizance of and decide on the validity of claims emanating from foreign governments which claimed the sovereignty or had actual possession of the territory in which the lands so claimed are situated.

That the aforesaid tract of land is situated in the territory which was called by the Spanish authorities thereof, the province of West Florida, and of which said Spanish government claimed and held actual possession until 1829, though the United States claimed the same as being included in the purchase of Louisiana from
9 the Republic of France, and that the diplomatic controversy about the sovereignty of said territory was finally closed by the treaty between the United States and Spain, by which the latter transferred to the former of said powers the sovereignty of the territories of East and West Florida, from the Mississippi river to the Atlantic ocean.

Your petitioners further show that by the 8th section of the aforesaid treaty of February 22, 1819, the United States bound themselves to maintain the validity of all titles to land within said territories which had been issued by the Spanish authorites thereof, and that the above-mentioned permission to settle, followed as it was by actual continued settlement, would undoubtedly have been perfected into a complete title if the Spanish government had remained in possession.

Your petitioners further show that, in obedience to said
10 act of Congress of June 22, 1860, renewed by the act of March 2d, 1867, and by the act of June 10, 1872, under which they now proceed, they have caused an accurate map to be made by a competent person, which is hereto annexed and marked Robinson B, and which substantially represents the land delineated in the map annexed to the above-mentioned petition of the said Philip Robinson to the commandant of the post of Galveston, of January 20, 1804, and at the same time the U. S. public surveys by which said land is covered. That from said map and the certificate thereto annexed it appears that the said tract of land claimed under said Philip Robinson cannot be located and appropriated to the claim of these petitioners, because the whole of it has been alienated by the United States to the State of Louisiana, or to private persons, except 432.36 acres.

11 Your petitioners further show that from said map it appears that said tract of 2,100 arpents is equivalent, in American measure, to 1,786.47 American acres; that out of said quantity there are still vacant the following pieces of land, to wit: in township 7 S., R. 4 E., S. E. ¼ section 34, containing 155.24 acres; S. W. ¼ of S. W. ¼ sect. 34, containing 389.2 acres, and fractional S. ½ N. W. ¼ sect. 34, of 58.20 acres; and in township 8 S., R. 4 E., fract. N. E. ¼ sect. 9, of 100 acres, and W. ½ N. E. ¼ sect. 10, of

80 acres; in all 432.36 acres; both of said townships being in the Greensburgh land district of the State of Louisiana.

Your petitioners further show that the correctness and contents of said plan of a double aspect, marked Robinson B, are corroborated by the annexed sworn statement, required by the 1st section of the aforesaid act, and that they are also provided with the certificate of the register of the consolidated land office at New
12 Orleans, required by the 6th section of the said act, showing that 1,354.11 acres of said land have been disposed of by the United States, for which amount the petitioners are, therefore, entitled to receive certificates of location.

Wherefore your petitioners pray that the district attorney of the U. S. for this district may be cited; that after due proceedings the aforesaid claim to 2,100 arpents be declared valid and binding upon the United States; that your petitioners be declared to be entitled to certificates of location for 1,354.11 acres, and that patents be issued to them for the following tracts of land in the Greensburgh land district of the State of Louisiana, viz: in T. 7 S., R. 4 E., S. E. ¼ section 34, containing 155.24; S. W. ¼ of S. W. ¼ sec. 34, of 389.2 acres, and fract. S. ½ N. W. ¼ sect. 34, of 58.20 acres;
13 and in T. 8 S., R. 4 E., fract. N. E. ¼ sec. 9, of 100 acres, and W. ½ N. E. ¼ sect. 10, of 80 acres; in all 432.36 acres.

LOUIS JANIN,
Of Counsel for the City of Baltimore.
H. D. OGDEN,
Special Counsel for City of New Orleans.
GEO. S. LACEY,
City Atty.

Benjamin F. Flanders, being duly sworn, deposes that he is the mayor of the city of New Orleans, one of the petitioners herein; that the allegations set forth in the foregoing petition are true to the best of his knowledge and belief; and whereas the 1st and 11th sections of the act of Congress of June 22, 1860, under which this suit is instituted, require the claimant to file a sworn statement of the portion of the surveys of United States supposed to
14 be covered by the claim prosecuted, he further said that this statement is best made by the annexed plan, marked Robinson B, which shows much more intelligibly than could be shown in words the corresponding portions of the Spanish and American surveys, and which is therefore to be taken as a part of this affidavit.

BENJ. F. FLANDERS, *Mayor.*

Sworn to and subscribed before me, this 6th day of Nov'ber, A. D. 1872.
W. F. EVANS,
Second Justice Peace.

I admit that service of this petition was made this 9th Nov., 1872.
J. W. GURLEY,
Asst. U. S. Atty.

Affidavit of Louis Janin and Document Attached, Filed Dec. 7, '72.

McDONOUGH'S LEGATEES } 24.
vs.
THE U. STATES. }

15 Louis Janin, being duly sworn, deposes that he is counsel for the city of Baltimore for the prosecution of the unconfirmed land claim which the said city is entitled to jointly with the city of New Orleans, under the provisions of the will of the late Jno. McDonough; that he was very lately preparing a suit to be instituted under the act of Congress of June 22, 1860, renewed by the act of June 10, 1872, upon the claim of 2,100 arpents, originally the property of Philip Robinson, upon which the said late John McDonough had heretofore, on the 15 June, 1846, instituted a suit in the District Court of the U. S for the District of Louisiana, under the act of Congress of June 19, 1844, in which, after a judgment of the district court of the U. S. in favor of the plff., an appeal was taken to the Sup. Court of the U. S., where said judgment was reversed. That when examining the record of said
16 suit the affiant found that the title which was set up in the petition and filed with it, described in the list of evidence as document E, No. 1, and of which a translation was filed at the same time with the petition, viz., on 15 June, 1846, was missing; that notwithstanding diligent search, with the assistance of the officers of said district court, he has been unable to discover said original doct. E, No. 1; that he has also ascertained that said document had been recorded in the office of the clerk of the commissioner of land claims west of the Pearl river and east of the Mississippi, in liber F, No. 1, fo. 418; that the records of said office, which was afterwards called the Greensburgh land office, have, within a few years been deposited at the New Orleans land office; that it appears from an original certificate of one of the former commissioners of said office, put on record many years ago, that said record
17 E, No. 1, had, many years ago, been accidentally destroyed, and that therefore, in order to replace the said original document E, No. 1, which should have been found in the said record of said suit, instituted under said act of Congress of June 17, 1844, the affiant procured from the clerk of the Supreme Court of the U. S., a certified copy hereto annexed, of said document E, No. 1, as contained in the transcript of said case instituted under said act of June 17, 1844, which on appeal was sent up to the Supreme Court of the United States. LOUIS JANIN.

Sworn to and subscribed before me, this 7 Dec'ber, 1872.
N. LOEW, *U. S. Comr.*

Doct. E, No. 1. Petition of Philip Robinson.

Senor Commandante Don Thomas Estevan.

Don Felipe Robinson, habitante de este distrito à vm. repre-

18 senta que ha poseido pacificamente como baquiera y ha cultivado desde de el año de 1797, una porcion de tierra, sobre el bayu Gotohell, sobre el que actualmente reside con su familiâ, habien do se fixado alli a aquella epoca con permito del commandante predecessor de vm. pera el memorial del exponente y dicho permido han sido des graciada mente perdido y destruidos por el incendio de mio casa.

Que ultiniamenta la tierras contiguas a las que reclama el exponente han sido apeadas á favor de Don Geronimo Lachiapella, y temiendo de que algun intruso la bondad de remorar, la orden a su favor, lindando la dicha tierra con dicho Lachiapella al este y oeste, y al norte con tierras del dominio de S. M. extendiendose des de dicho bayu en profundidad hasta el limite de dicho Lachiapella, y al sur con el mismo bayu Gotohell, dicha porcion de tierra
19 continiendo como dos mil y cien arpanes, como apanece del plano que precede.

Distrito de Galveztown, el 20 de Enero de 1804.

PHILIP ROBINSON.

GALVEZTOWN, 20 *de Enero de* 1804.

Esta parte pende continuar en la posesion de la tierra establecida con permiso de mi antecessor, y se presentara à la Intendencia general, para obtiner sus titulos en forma.

Sig. THOMAS ESTEVAN.

LOUISIANA.

Recorded in the office of the clerk of the commissioner of land claims west of Pearl river and east of the Mississippi, in liber F, No. 1, fo. 418.

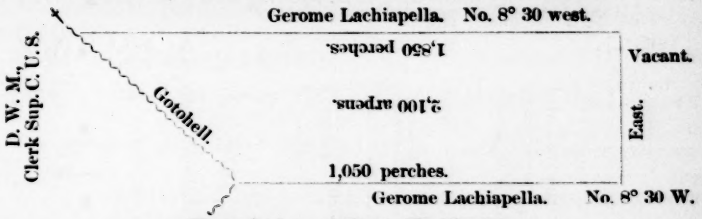
CHARLES S. COSBY, *Clerk.*

I, D. W. Middleton, clerk of the Supreme Court of the United States, do hereby certify that, as appears from the transcript of
20 the record of the suit of the United States, appellant, vs. John McDonough, December term, 1853, on appeal from the U. S. Dist. Court for Louisiana, on file in my office, the foregoing is a true copy, taken from said transcript, of a document marked E, No. 1, and made part of the petition filed by John McDonough in said suit, June 15, 1846, in the District Court of the U. S. for the Dist. of Louisiana, as suit No. 41 of the land docket of said court, in which case an appeal was granted to the Supreme Court of the U. S., in May term, 1849, and the motion for, and allowance of, appeal were made May 30, 1849, and the transcript in which case is the one hereinbefore first mentioned.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Supreme Court, at the city of Washington, this
21 21st day of November, A. D. 1872.

D. W. MIDDLETGN,
Clerk Sup. Court U. S.

Document attached to petition of Philip Robinson.



Translation of Doct. E, No. 1.

To the Commandant, Don Tomas Estevan.

Phillip Robinson, an inhabitant of this district, respectfully represents to you that, since the year 1797, he has been in quiet possession of, and has used as a stock farm, a tract of land situated on bayou Gotohell, and that he now resides thereon with his
22 family. That he established himself on said tract at said time with the permission of your predecessor, but that his petition and the permit of the commandant were unfortunately lost and destroyed by the burning of his house. That recently the lands contiguous to those claimed by your petitioner have been surveyed in favor of Don Geronimo Lachiapella, and your petitioner, fearing lest some intruder might encroach upon his rights, begs you to renew in his favor the order or permit of your predecessor, bounding his tract as follows: On the east and west by the lands of the said Lachiapella; on the north by the public domain, extending the depth from the said bayou as far back as the boundary of the said Lachiapella tract; and on the south by said Bayou Gotohell. Said tract to contain about 2,100 arpents, as appears from the accompanying plan.

District of Galveztown, Jan. 20, 1804.

PHILIP ROBINSON.

GALVESTOWN, *Jan.* 20, 1804.

23 This party may remain in the possession of the land settled by him under the permit of my predecessor, and he will apply to the intendant-general for his formal title.

Sig. THOMAS ESTEVAN.

STATE OF LOUISIANA, }
PARISH OF ORLEANS. }

On this 26th day of January, A. D. 1877, before me, the undersigned notary public, personally appeared Albert C. Janin, and stated, under oath, that he is familiar with the Spanish language, and that the foregoing is a true and correct translation made by himself of a Spanish document, marked E, No. 1, and filed in the suit of McDonough's Legatees vs. The U. S., No. 24, New Land Docket of the U. S. District Court, on Dec'r 7, 1872, together with an affidavit of Louis Janin. In faith whereof, he hereunto signed his name.

ALBERT C. JANIN.

24 Witness my hand and seal, the day and year above written, at New Orleans, La.

[SEAL.] A. ABAT. *N. P.*

Claim No. 306. Report on Brown & McDonough's claim, marked C. B., Register of Claims to Land in the district west of Pearl river, in Louisiana, founded on orders of survey (requettes), permission to settle, or other written evidence of claims derived from either the French, British, or Spanish authorities, which, in the opinion of the commissioner, ought to be confirmed.

Number.	By whom claimed.	Original claimant.	Nature of claim & from what authority derived.	Date of claim.	Quantity claimed.	Where situated.	By whom issued.	When surveyed.	By whom surveyed.	Inhabited and cultivated.	General Remarks.
306	Brown. McDonough.	P. Robinson.	Permission.	20 Jan. 1804.		St. Helena.	T. Estevan.			From To 1803 1804	To occupy a certain tract of land.

SURVEYOR-GENERAL'S OFFICE,
NEW ORLEANS, LA., *Aug.* 16, 1872.

I certify the above to be a true copy from State Papers, vol. III., page 53, (Duff Green edition,) now on file in this office.

E. W. FOSTER, *Surveyor-General La.*

25 Copy of petition and admission filed in the case of the cities of Baltimore and New Orleans vs. The United States.
No. 9.
Petition filed Febr'y 16, 1870.

To the honorable the judge of the District Court of the U. S. for the District of Louisiana.

The petition of the cities of New Orleans and Baltimore respectfully shows:

That your petitioners are political corporations incorporated—the former by the legislature of the State of Louisiana, and the latter by the legislature of the State of Maryland; that, under the will of the late John McDonough, they are the joint proprietors, each for one undivided half of certain unconfirmed land claims hereinafter described; that the said John McDonough died at New Or-
26 leans on the 26 October, 1850, leaving an olographic will, bearing date 29 of December, 1838, and which was duly filed, probated, and ordered to be executed on the 28th of October, 1850, by the judge of the then fifth district, wherein the succession of said McDonough was opened, and that your petitioners were duly constituted the universal legatees by said will, which reads:

I give, will, and bequeath all the rest, residue, and remainder of my estate, real and personal, present and future, as well that which is now mine, as that which may be acquired by me hereafter at any time previous to my death and of which I may die possessed, of whatever nature it may be and wheresoever situate, (subject
27 to the payment of the several annuities or sums of money hereinafter directed and set forth, which said annuities or sums of money are to be paid by the devisees out of this my general estate out of the rents of said estate,) unto the mayor, aldermen, and inhabitants of New Orleans (my adopted city), in the State of Louisiana, and the mayor, aldermen, and inhabitants of Baltimore (my native city), in the State of Maryland, and their successors (in equal proportions of one-half to each of said cities of New Orleans and Baltimore) forever.

Your petitioners show that all the titles of which they now claim the confirmation are perfectly alike, and that for the purpose of showing their character they beg leave to submit a brief
28 exposition of their origin, and present political and legal aspect, viz:

That, at the time of the cession of the State of Louisiana to the United States in 1803, that part of the present State of Louisiana which is bounded to the south by the river Iberville, to the west by the Mississippi river, to the east by the Perdido river, and to the north by the 30th degree of latitude and the State of Mississippi, was not taken possession of by the United States, but remained in the possession of Spain, which power claimed that extent of country as part of the Spanish province of West Florida.

That diplomatic negotiations concerning the ownership of said territory were carried on for many years between the said two sovereign powers, but were not settled except by the treaty of Feb'ry 22, 1819, by which Spain transferred to the United States
29 the whole extent of West and East Florida, from the Mississippi to the Atlantic.

That while Spain was in actual occupancy and possession of the above described territory under the said disputed claims, that is, from 1803 to 1810, when the Spanish garrison of Baton Rouge was expelled by the uprising of the population, Juan Ventura Morales, the Spanish intendant of the province of West Florida, made, with the consent of his government, a number of sales of lands within said district, giving perfect titles thereto.

In 1812 this disputed territory was provisionally annexed to the State of Louisiana under a proclamation of the President.

That on the 25 April, 1812, Congress passed an act entitled "An act to ascertain the titles and claims to land in that part of Louisiana which lies east of the Mississippi river and island of New Orleans," and that all of the aforesaid sales of land made by Morales
30 within the boundaries of said disputed tract were declared null and void by the commissioner appointed under said act, on the ground that said land was a part of Louisiana and included in the cession thereof in 1803.

That the validity of said sales afterwards, viz., in 1829, formed the subject of an elaborate discussion in the Supreme Court of the U. S. in the case of Foster and Elam vs. Neilson, (2 Pet., 253,) in which the Supreme Court held that the determination of a national boundary was a political and not a judicial question, in which the courts were bound to follow and carry out the conclusions of their government. And the court furthermore held that the faith of the United States was indeed pledged by the 8th section of said treaty of February 22, 1819, to protect and maintain the grants
31 made by Spain within the territory ceded, but that the words of the treaty did not confirm them proprio vigore, but were words of promise or contract which required further legislation to enable the courts to carry out the contract.

And your petitioners show that this further legislation has now been had by the act of Congress of June 22, 1860, extended by the act of March 2, 1867, and that by the 1st, and particularly by the 11th section of said act of June 22d, 1860, the courts have been expressly authorized to take cognizance of grants issued by governments de facto, though the grants were unaccompanied by possession.

That the land claims of the aforesaid description, which were the property of the said John McDonough at the time of his death, were derived from sales made by Juan Ventura Morales,
32 the intendant of the Spanish province of West Florida, to three different parties, viz., Geronimo Lachiapella, Louis

and Alexander Declouet, and Juan Delasize, and that the particulars of each of said claims are as follows, viz:

1. That Geronimo Lachiapella having applied to said intendant for a purchase of 120,000 arpents, the said intendant directed Charles Lareau Trudeau to survey said extent of land for said Lachiapella, and that after the survey of said land and its appraisement, and the approval of the said appraisement by the said intendant and the payment of the appraised value into the royal treasury, the said intendant, Morales, executed, on the 28th of March, 1804, in the name of his sovereign, a complete title to said Geronimo Lachiapella, which was delivered to him and accompanied by the original plans of survey in which the said 120,000 arpents are represented as divided into six different tracts; that on the 17th May, 1804, the said Geronimo Lachiapella sold an undivided half of said 120,000 arpents to John McDonough and Shepherd Brown, by an act passed before Pierre Pedesclaux, a notary public at New Orleans. That by an act passed before same notary on 11 December, 1805, the said Geronimo Lachiapella, John McDonough, and Shepherd Brown sold the whole of the said 120,000 arpents to William Donaldson; that by another act passed before the said notary, Pedesclaux, on January 2d, 1806, the said William Donaldson sold the whole 120,000 arpents to said Jno. McDonough and Shepherd Brown, and that on the settlement of the partnership existing between the said McDonough and Brown the said 120,000 arpents became the exclusive property of said Jno. McDonough, as will be proved by notarial acts and judicial proceedings.

33

34

That under the above-mentioned act of Congress of April 25, 1812, the said McDonough filed the said claim with the commissioner to ascertain titles to lands west of Pearl river, and that the said commissioner reported adversely on said claim, on the ground that the land which the said Spanish intendant had sold was American and not Spanish territory; that Congress having, on June 17th, 1844, passed an act entitled an act for the adjustment of land claims within the States of Missouri, Louisiana, and Arkansas, which gave to the U. S. district courts jurisdiction over certain land claims, subject to an appeal to the Supreme Court of the U. S., the said John McDonough instituted, on the 6th June, 1846, a suit against the United States in the District Court of the United States for the Eastern District of Louisiana as suit No. 23 of the land docket of said court, claiming confirmation of his aforesaid land claim, and that the decision of the said district court was in favor of said claim, but was reversed by the Supreme Court of the U. S. on the ground that said courts had no jurisdiction over this class of claims.

35

2. Your petitioners further show that the second of the said claims of John McDonough was under two titles obtained by Louis and Alexander Declouet, one for 50,000 and the other for 40,000 arpents, as follows, viz:

On the 24th of October, 1803, the said Louis Declouet, acting for himself and his brother, Alexander Declouet, applied to the said intendant, Morales, for permission to purchase 50,000 arpents of land, offering to pay for the same the price at which said lands might be appraised, one-third in cash, one-third in six months, and the remaining third in one year, and to give satisfactory security for these deferred payments; that on the same day the same parties applied to the said intendant to buy another portion of 40,000 arpents, on the same terms as those proposed for the aforesaid first purchase; that both of said applications were referred by said intendant, as was frequently his practice, to the highest authorities then administering for the Spanish government both the provinces of Louisiana and West Florida, and that said functionaries having all advised him to accept said applications, said intendant, Morales, issued, in the first case, on the 15th November, 1803, and in the 2d case, on the 16th November, 1803, an order directing that the extent of land, the purchase of which was applied for, be surveyed, then appraised, in order that after the payment of the appraised value of said lands the formal titles to said lands be issued to said petitioners.

And your petitioners further show that by an act, under private signature, of the 6th March, 1806, the said Louis Declouet, acting for himself and his said brother, Alexander Declouet, whose power of atty. he held, sold the said 90,000 arpents of land to the said Jno. McDonough, which act, under private signature, was, on the the 19th March, 1829, deposited by the said Jno. McDonough in the office of Louis T. Caire, notary public in and for the parish of New Orleans, before whom also the handwriting of said grantor was proved by the oath of three witnesses. That thereafter, in consequence of the aforesaid act of Congress of April 25, 1812, the said John McDonough filed the documents containing the aforesaid applications of said Louis Declouet and Alexander Declouet, and all the aforesaid reports of officials and the orders of Juan Ventura Morales, in the office of the commissioner appointed to ascertain the titles and claims to lands in that part of Louisiana which lies east of the Mississippi river and the island of New Orleans, and the said commissioner made an unfavorable report on said claim, on the ground that the land applied for was in American and not Spanish territory; and that in his report the said commissioner further stated that the payment of the estimated value, three cents per arpent, was proved by the certificate of two witnesses, and that certified plats of the survey of said lands, made by Lareau Trudeau, in 1803, had also been filed.

Your petitioners further show that in consequence of the beforementioned act of Congress of June 17, 1844, entitled an act for the adjustment of land claims within the States of Missouri, Arkansas, and Louisiana, &c., the said McDonough instituted, on the

6th of June, 1846, a suit against the U. S. in the District Court of the U. S. for the Eastern District of Louisiana, being suit No. 24 of the land docket of said court, in which he claimed
40 the confirmation of his titles to the said 90,000 arpents of land, derived by him from the said Louis and Alexander Declouet, that the decision of said district court was in favor of the validity of said titles, but that said decision was on appeal reversed by the Supreme Court of the U. S., and the case dismissed for want of jurisdiction.

Your petitioners show that it appears from certificates of Carlos Trudeau, dated Sept. 14, 1814, that the said two grants of 50,000 and 40,000 arpents respectively, surveyed in November and December, 1803, by Carlos Trudeau, then the surveyor-general of Louisiana and West Florida, and by him delivered to the said intendant, Morales, in February, 1804, the said Morales then
41 still being and having an office in the city of New Orleans; that said surveys were in conformity with the grants made to said Declouet, and order of survey of said Morales; that said lands were estimated by four persons, two of whom were appointed by him, said Carlos Trudeau, on behalf of the king, and the others were selected by the Messrs. Declouet; that said lands were appraised at three cents an arpent, and that the said Trudeau received from said Declouet the full amount of the fees due him as surveyor-general for said surveys and plats.

Your petitioners further show that the said certificate and plats of Carlos Trudeau, frequently called Carlos Lareau Trudeau, were filed in the office of the commissioner west of Pearl river,
42 appointed under the act of Congress of April 25, 1812, and in the aforesaid suit, instituted under the said act of Congress of June 17, 1844, and were received and acted upon as evidence, both by the said commissioner and by the said U. S. district court.

Your petitioners further show that under the said certificates of Lareau Trudeau, by far the most important and reliable witness, that remained in Louisiana after the cession of 1803, and the aforesaid report of the commissioner appointed under said act of Apl. 25, 1812, they have found no proof among the papers of the said John McDonough or in any public office accessible to them, of the payment of the price of said land by Declouet; that the papers of
43 the land office at Greensburgh, Louisiana, where the records of the said commissioner under the act of April 25, 1812, were, were lately ordered to be brought to the land office at New Orleans, where they are in custody of the register of the land office of the southeastern district of Louisiana; that your petitioners have applied to said register for copies of the documents recorded by the said McDonough in support of the said Declouet claim, but were informed that they were not extant in said office; that they have further ascertained that during the late war, to wit, in 1864, some

cavalry troops of the Union army removed the papers of the said Greensburgh's land office to Baton Rouge, and that all trace of many missing documents of said land office is lost.

Wherefore your petitioners humbly submit, contend, and aver that the unimpeached testimony of said Carlos Trudeau and
44 of the said report of the commissioner appointed under the act of April 25, 1812, are full and sufficient proof that the aforesaid price of said 90,000 arpents was paid by the said Declouet, and that as the necessary consequence thereof a complete passed and was issued to said Declouet, and your petitioners are entitled to the benefit thereof.

3. Your petitioners further show that the 3d claim, the confirmation of which they claim as devisees of the said Jno. McDonough, is based on a sale and complete grant of the same description as those above mentioned, made by the said intendant, Juan Ventura Morales, on the 15th of May, 1804, to John Delassize, of
45 40,000 superficial arpents in the above described disputed territory, said 40,000 arpents having previously been surveyed by the surveyor-general, Carlos Trudeau, in obedience to the preliminary order of survey of said intendant, and being divided into five different tracts.

Your petitioners further aver that a duly certified copy of said sale, taken from the book of lands sold by the intendancy of West Florida, was filed in the St. Helena land office and there recorded, as appears from the certificate endorsed on said documents, but that the record thereof is not extant in the archives of said land office, which were brought from Greensburgh to the U. S. land office at New Orleans, and were probably destroyed or lost by the same causes which were heretofore set forth in relation to the titles
46 to the land derived from Louis and Alexander Declouet, and that for the same reasons the petitioners are unable to state whether any or what report was made upon the said claim by the land office in which it was first filed.

Your petitioners aver that by an act passed before Marc Lafitte, Not. Pub. in and for the Parish of Orleans, the said Jean Delassize sold one undivided third of the aforesaid claim of 40,000 arpents to said Jno. McDonough; that thereafter, to wit, on 9th June, 1846, the said Jno. McDonough brought suit against the U. S. in the District Court of the U. S. for the Eastern District of Louisiana, claiming the confirmation of his title to one-third of said tract of land of 40,000 arpents; that said suit was instituted under
47 the aforesaid act of Congress of June 17, 1844, providing for the adjustment of land claims, and was suit No. 26 of the docket of said court. That said district court, while admitting the genuineness of the title set up, yet dismissed the suit under a mistaken impression that its jurisdiction was restricted to titles anterior to the 10th March, 1804, whereas this was issued in May, 1804, and that on appeal to the Supreme Court of the U. S., said

suit, like many others of the same description, was dismissed, upon the ground that the courts were without jurisdiction in this class of claims, known as the Morales sales.

Your petitioners show that the title-papers herein set forth of the three claims for the recovery of which this suit is brought, viz., the Lachiapella, the Declouet, and the Delassize claims, are on file
48 in the three above-mentioned suits which were instituted by the said Jno. McDonough in the District Court of the U. S. for the Eastern District of Louisiana, of which court this honorable court is the successor and the depository of its records; that said suits are Nos. 23, 24, and 26 of the old docket of said court, and that your petitioners beg leave to refer to said title-papers and to said records as if they were parts of the present suit.

Your petitioners further show that in obedience to said act of Congress of June 22, 1860, under which they now proceed, they have procured accurate copies to be made of the original Spanish plats of survey of the aforesaid three claims; that said copies ex-
49 hibit said Spanish surveys on the scale prescribed for the official surveys of the public lands of the United States; that said copies represent the Spanish claims in red lines and superposed upon the Spanish claims the United States surveys of the same tract of land in black lines, thus showing upon the same sheet of paper both what lands were sold by the Spanish intendant and how the United States government has disposed of the said lands, and thus simultaneously enabling this honorable court to decide what portions of said lands can be recovered in kind by the petitioners, and for what portions thereof, now covered by titles emanating from or confirmed or donated by the United States, the petitioners are entitled to certificates of location under the 8th section of the aforesaid act of Congress of June 22, 1860.

Your petitioners further show that the contents and cor-
50 rectness of said plans of a double aspect, which they have procured to be prepared by competent persons, is corroborated by the annexed sworn statement required by the 1st section of the aforesaid act, that they are also provided with the certificate of the surveyor-general of the United States for the State of Louisiana, required by the 6th section of said act.

The petitioners beg leave to annex said plans and copies which are marked, viz: the plan representing the Lachiapella claim, *McDonough A*; the two plans representing the Declouet claims, *McDonough B* and *McDonough C*, and the plans representing the Delassize claim, *McDonough D*; and they pray that the said plans be consid-
51 ered as parts of this petition, as much so as if the contents thereof were fully set forth and described in words in this petition.

Your petitioners show that by their aforesaid treaty with Spain of the 22d February, 1819, the United States have bound themselves and pledged their faith.

Wherefore your petitioners pray that the district attorney of the U. S. of this district be cited; that, after due proceedings, the aforesaid claims be declared valid and binding upon the United States; that your petitioners recover judgment under their aforesaid three claims, as follows, according to the aforesaid sworn statement, and the said plans marked McDonough A, McDonough B, McDonough C, and McDonough D, under the Lachiapella claim for 120,000 arpents, under the two Declouet claims, as exhibited on the annexed plans marked McDonough B and McDonough C, 89,980
52 arpents, and under the Delassize claim, as exhibited by said plan marked McDonough D, to one-third of 40,000, or 13,333 arpents.

And whereas it appears from the certificate of the surveyor-general of the U. S. for the State of Louisiana, annexed to said plans, that all the land embraced within said three claims is held under superior titles emanating from the United States, and the claims of your petitioners cannot be satisfied out of the said land in kind; and your petitioners are therefore entitled, under the 8th section of the aforesaid act of Congress of June 22, 1860, to certificates of location for an equivalent extent of ground to be located upon any public lands of the U. S., subject to private entry; your petitioners further pray that they be decreed to be entitled to such certificates of location for (189,816) one hundred and eighty-nine thousand
53 eight hundred and sixteen acres, that being the amount in acres equivalent in extent to 223,313 arpents, to which your petitioners are entitled under the aforesaid three claims; and your petitioners will ever pray, &c., as in duty bound.

(Sig.) J. R. BECKWITH,
City Attorney.

(Sig.) LOUIS JANIN,
H. D. OGDEN,
Of Counsel for Plffs.

John R. Conway, being duly sworn, deposes and says that he is the mayor of the city of New Orleans; that he is well acquainted with the contents of the foregoing petition, and to the best of his knowledge and belief he believes them to be true, as well as the plans marked McDonough A, McDonough B, McDonough
54 C, and McDonough D, thereto annexed; that he verily believes that the above-mentioned grants or sales by the Spanish intendant are correctly represented in said plans and adapted to the seals of the public surveys of the United States; that said plans also correctly show what portions of the public surveys of the U. S. are covered by said Spanish titles, and that said plans should, therefore, be taken as part of this affidavit.

(Sig.) JOHN R. CONWAY, *Mayor.*

Sworn to and subscribed before me, Febry. 8, 1870.

(Sig.) A. SHELLEY,
2 Justice Peace, Parish of Orleans.

Service of citation and petition acknowledged.
New Orleans, Feby. 23, 1870.
(Sig.) P. H. MORGAN, *U. S. Atty.*

Admission, filed Nov. 6, '71.

55 CITIES OF BALTIMORE AND NEW ORLEANS *vs.* THE UNITED STATES. } No. 9.

It is admitted that the part of the will of John McDonough, by which the plaintiffs are instituted universal legatees, and the probate of said will are correctly set forth in the petition, and in accordance with the statements of the opinion of the Supreme Court of the U. S. in the case of McDonough's Exrs. vs. Murdock & al., reported in 15th Howard, 367, and 20th Curtis' edition, 564.

(Sig.) J. W. GURLEY,
Asst. U. S. Atty.

Clerk's office. True copy.
N. Orls., March 13, '73.

J. A. CHARBONNET,
Dy. Clerk.

Answer, filed 29 *Septr.*, 1877.

56 McDONOUGH'S LEGATEES *vs.* UNITED STATES. } No. 24.

The defendants, now and at all times hereafter reserving all benefit and advantage which can or may be had to the errors and imperfections in plaintiff's petition contained, for answer thereto say:

That they are ignorant whether such grants or sales of land were made as alleged, and they, therefore, deny the same.

That they are ignorant of the mesne conveyances by which the title to said lands is stated to have reached and rested in plaintiffs.

And further answering, they say, that if the grants or sales of land as in said petition alleged were made by any competent authority under the Spanish government to the said Philip
57 Robinson, which is denied, the same were never separated by actual survey and metes and bounds from the mass of the public domain, and are thereof null and void by reason of uncertainty of location and vagueness of description.

And further answering, defts. aver that under the 6th section of act of Congress of 22 June, 1860, petitioners are entitled, in the event of the confirmation of said titles by the court, and in case any part of the lands claimed have been sold by the U. S. or cannot be surveyed and located, to enter of the public lands of the U. S. a quantity equal in extent to that *sold* by the government, and by the 11 sec. of the said act, to a patent for so much as may remain unsold or public.

And defendants aver that a large portion, to wit, —— acres of said lands have been disposed of by the U. S. otherwise than
58 by *sale*, and that other large portions thereof, to wit, —— acres, were disposed of to others by the Spanish authorities, before the transfer of the territory to the United States, and for all lands so disposed of these defendants cannot, in law or equity, be held to account to the plaintiffs, and the same should be deducted from the quantity of land as claimed by the plaintiffs, in the event of the confirmation of their titles.

And further answering, defendants say, that the titles under which the plaintiffs claim, to wit, the permission to settle, granted to Philip Robinson, did not invest the said Robinson with absolute ownership or title to said lands; that the said permission to settle was a mere inchoate title, and gave to the holder no other right than that of occupancy; that under the 11th section of
59 said act of 1860, under which this suit is instituted, this hon. court is without jurisdiction to hear and determine any other than complete grants, the said act providing in its 2d section that titles of the character of this should be submitted to the board of land commissioners for examination and report.

And further answering they say, that it appears from plaintiffs' petition, that in June, 1849, suit was instituted against the United States, before this court, by John McDonough, through whom plaintiffs claim title, to establish the validity of this same alleged title, and recover said lands, and that an appeal was prosecuted from the decree rendered by this court therein, to the Supreme
60 Court of the U. S. Defendants aver that said cause was duly heard on said appeal in the Supreme Court, and that the said court, at its December term, A. D. 1853, directed a decree to be entered in favor of the United States, which was accordingly done.

And defendants aver that the decree so rendered in their favor is final and conclusive between the United States and the plaintiffs herein, and they plead the same as *res adjudicata* in bar of this suit.

And further answering they say that, as in said petition alleged, the said John McDonough did, under an act of Congress of the U. S. authorizing so to do, submit his claims under said grant to a board of land commissioners for examination and decision. That the said board admitted the validity of said claim, to the extent of 1,280 arpens; defendants aver that the said Mc-
61 Donough acquiesced in the said decision, and is therefore bound thereby, and is estopped from setting up any claim for a larger quantity of land under the said titles, as are the plaintiffs also, who claim under him.

All which matters and things defendants are ready and willing to aver, maintain, and prove, as this honorable court shall direct; and humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

J. W. GURLEY, *Asst. U. S. Atty.*

Replication, filed 11 *Feb'ry*, 1878.

To the honorable District Court of the U. S. for the District of Louisiana.

The replication of McDonough's legatees to the answer of the United States, filed by the district attorney thereof, in the suit
62 pending in this honorable court between the said replicants and the United States.

These replicants, saving and reserving unto themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto say, that they will aver and prove their bill to be true, certain, and sufficient in the law to be answered unto, and that said answer of said defendants is uncertain, untrue, and insufficient to be replied unto by these replicants, without this, that any matter or thing whatsoever in said answer contained, material or effectual in law to be replied to, confessed, and avoided, traversed or denied, is true; all of which matters and things these replicants are and will be ready to aver and prove as this honorable court shall direct; and they humbly
63 pray, as by their said bill they have already prayed, &c.

ALBERT C. JANIN,
Of Counsel for Petitioners.

Defendant's Evidence.

Petition filed June 15, 1846.

JOHN MCDONOUGH
vs.
THE UNITED STATES. } No. 41 of the Old Land Docket.

To the Hon. Theodore H. McCaleb, judge of the U. S. District Court in and for the District of Louisiana.

The petition of John McDonough, residing in the parish of Orleans, State of Louisiana, respectfully represents that on or about the 20 January, 1804, Philip Robinson presented a petition to Don Thomas Estevan, the commandant of the district of Galvestown, setting forth that he had been in the peaceable possession of a tract of land as a vacherie or stock farm for black cattle, and
64 cultivated the same since the year 1797, on the bayou Colyel (now regularly called bayou Gotohell), and on which he now resides with his family, having settled thereon since the aforesaid period, with the leave and permission of the preceding commandant, but that said permission has been unfortunately lost and destroyed by fire by the burning of his house; that lately the lands bounding those which your petitioner claims have been marked and measured in favor of Don Geronimo Lachiapella, and that fearing that some intruder may injure him, he therefore prays that the said commandant may be pleased to renew the order in his favor, bounding said land with said Lachiapella to the east and west, and to the north with the land of his majesty's dominion, extending in

depth from said bayou to said Lachiapella's land, and to the said with said bayou Colyel, containing about 2,200 arpents, more
65 or less, as is shown more fully by the preceding plan; that upon the said petition the said commandant ordered that said Robinson might continue in possession of the said land, settled with the permission of the predecessor of said commandant, all of which, together with other necessary particulars, will more fully appear by reference to the annexed docts. marked E, No. 1, made part of this petition; and your petitioner further represents that said grant or concession included all the land comprised within the limits of survey of Geronimo Lachiapella, and bounded by said lines on two sides, having 1,850 perches on one side in depth from said bayou, and 1,050 perches in depth on the other side from the said bayou; that the metes and bounds of said land, its location and description, will more particularly appear by reference to said annexed plan and survey; that on or about the 12 November, 1804, the said grantee, Philip Robinson, sold and conveyed said tract of land accord-
66 ing to the grant and plan of survey thereof, with its courses, distances, &c., to McDonough & Brown, by a deed executed before the said commandant of the district of Galvestown, West Florida, as will appear by reference to a copy of said deed of sale marked E, No. 2, hereunto annexed as a part of this petition; that on the death of said Shepherd Brown, his partner in business and joint purchaser of the aforesaid tract of land, and in the settlement of said partnership and joint transactions with the heirs and legal representatives of the deceased, your petitioner became the sole and exclusive owner of said land, as will be proved in due time; that the titles of said land were duly presented to and proved before the board of land commissioners, who recognized and admitted the validity of said titles only to the extent of 1,280
67 arpents; that he has always insisted that he was entitled to the whole tract of land comprised within the before-mentioned boundaries, and has in no manner waived any of his rights thereto; that the whole of said tract of land, or the greater part thereof, has either been sold by the United States or confirmed to actual settlers; that he cannot and does not contest the title of those who are in possession of the said land, under the sales or confirmations aforesaid; that although the title to said land was inchoate, yet it would have been completed under and in conformity to the laws, usages, and customs of the Spanish government, under which it was granted, had not the sovereignty of the country been afterwards transferred to the United States.

68 Wherefore your petitioner respectfully prays that the district atty. of the United States for the district of Louisiana may be cited to appear and answer this petition; that the validity of the title of your petitioner to the whole of the before-described tract of land be enquired into and decided by the court; that after due proceedings had, judgment be rendered in favor of your peti-

tioner, decreeing and recognizing that the title of your petitioner to the whole of said tract of land is good and valid, and that your petitioner is entitled to enter a like quantity of land as is embraced within the aforesaid limits and boundaries, according to the provisions of the act of Congress in such case made and provided, in lieu of such part thereof as may have been sold or confirmed as
69 aforesaid; and your petitioner prays for all such other and further aid, relief, and remedy as the nature of his case may require, and to law and equity may appertain.

And as in duty bound he will ever pray, &c.

C. ROSELINS, *for Petitioner.*

John McDonough, being duly sworn, deposes and says, that all the facts and allegations in the foregoing petition contained are correct and true, according to the best of his knowledge and belief.

JOHN McDONOUGH.

Sworn to and subscribed before me, this 15 June, 1846.

L. E. SIMONDS, *Dy. Clerk.*

Defendants' Evidence.

Mandate of the Supreme Court of the U. S. in suit No. 41
70 of the old land docket. U. States vs. McDonough's Exrs. Filed Dec'ber 7, 1872.

UNITED STATES OF AMERICA.

The President of the U. S. of America to the honorable the judge of the District Court of the U. S. for the Eastern District of Louisiana, greeting:

Whereas, lately, in the District Court of the U. S. for the Eastern District of Louisiana, before you, in a cause between Jno. McDonough, complainant, and the United States, defendants, in chancery, the decree of the said district court was in the following words, viz.:

"This cause came on for hearing at the present term, to wit, on the 16th day of March, 1849, on the petition, answer, replication, exhibits, and proofs of record, and was argued by counsel for the complainant and the district attorney of the United States for the defendants, and the court being duly advised in the premises, and having fully considered the case, on this day rendered its opinion and decree, as follows:

71 The petitioner claims the quantity of 2,100 superficial arpents of land in controversy by virtue of a warrant or permission to continue in possession of the land granted, given on the 20th of January, 1804, by Thomas Estevan, the commandant, in writing, produced in evidence and proved by Louis Bouligny, a living witness examined at the trial.

The petitioner derives his title by regular conveyances from the original grantee, Philip Robinson, who had been in possession of the land by an order of the Spanish government since 1797, and so

continued until the 20th of January, 1804. The title was duly presented to the land office, as stated in the order aforesaid of the 20th of January, 1804, and was confirmed for only 1,280 superficial arpents.

For the reasons given at length in the case of Joseph Reynes vs. The United States (No. 10 of the docket), the court is of opin-
72 ion that the petitioner, John McDonough, has a valid claim to the tract of land claimed by him; that his claim is guaranteed by the cession of Louisiana to the U. States and by the law of nations, and that he is entitled to the relief granted by the act of Congress approved the 17th of June, 1844, entitled an act to provide for the adjustment of land claims within the States of Missouri, Arkansas, and Louisiana, and in those parts of the States of Mississippi and Alabama south of the 31 degree of north latitude and between the Mississippi and Perdido rivers and that to which it refers, approved May 26, 1824.

It is, therefore, ordered, adjudged, and decreed that the grant made by the Spanish government to the said Philip Robinson as aforesaid is valid against the United States, and the survey there of part of the grant of record herein as part of the exhibits, containing 2,100 superficial arpents more or less, according to and with the metes and bounds as described in said survey, and to be lo-
73 cated and surveyed conformably thereto, belongs to the petitioner, holding under the original grantee, a citizen and resident of the province of Louisiana.

And whereas it is ascertained that a great part of said tract of land is now held by titles emanating from the United States, it is further ordered, adjudged, and decreed, that for all the land within said limits so held, and which have been sold or otherwise disposed of by the U. S., the claimant shall be and he is hereby authorized to enter, after the same shall have been offered at public sale, the like quantity of land in parcels, conformably to sectional divisions and subdivisions, in any land office of the United States in the State of Louisiana; and if it should so happen that in making such entries there should remain in the hands of the enterer a fractional excess of acres of a less number than the smallest sectional divisions allowed by law to be sold, the party interested shall have the
74 right to enter, in virtue of such fractional excess, the quantity of one-half quarter-section of land, upon paying $1.25 for each acre contained in such half quarter-section over and above the fractional excess to which he may be entitled by this confirmation," as by the inspection of the transcript of the record of the said district court which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, at a previous term of this court, the death of John McDonough having been suggested and the appearance of Christ-

ian Roselius, Abiel D. Crossman, Wm. E. Leverich, Francois B. D'Atrien, Benj. C. Howard, John Spear Smith, Brantz Mayer, John Gibson, and R. R. Gurley, his executors, having been entered, it was ordered by the court that they be made the appellees,
75 with leave to resist this appeal.

And whereas, in the present term of December, in the year of our Lord, 1853, the said cause came on to be heard before the said Supreme Court on the said transcript of the record and was argued by counsel. On consideration whereof it is now here ordered and decreed by this court that the decree of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court with directions to that court to enter a decree for the United States.

Dec. 13.

You, therefore, are hereby commanded that such further proceedings be had in said cause, in conformity to the decree
76 of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Hon. Roger B. Taney, Chief Justice of said Supreme Court, the first Monday of December, in the year of our Lord 1853. (Sig.) WM. THOS. CARROLL,
Clerk of the Sup. Court of the U. S.

Memorandum for the Court, filed 21 *Feby.*, '78.

McDONOUGH'S LEGATEES
vs. } No. 24.
THE UNITED STATES.

The question in this case is, whether under the 11th section of the act of June 22, 1860, (12 Stat. at Large, p. 85,) the court has jurisdiction, the defts. contending that plffs. had merely a permission to settle, that this was no divestiture of title from the government of Spain, and that under said act the land commission-
77 ers alone had jurisdiction over such cases.

ALBERT C. JANIN.
J. W. GURLEY, *Asst. U. S. Atty.*
GEO. 8. LACY, *U. S. Atty.*

New Orleans, Febry. 15, 1878.

Does a permission to settle operate a divestiture?

List of Plaintiffs' Evidence, filed Feby. 21, 1878.

McDONOUGH'S LEGATEES
vs. } No. 24.
THE UNITED STATES.

The plaintiffs offered in evidence the following documents:

Doc. 1. Copy of petition and admission in suit No. 9 of the new land docket, instituted by the same plffs.

Doc. 2. Affidavit of Louis Janin, accompanied by a certified copy of a petition and permit to settle.

Doc. 3. Translation of said petition and permit to settle.

78 Doc. 4. Plan marked Robinson B.

Doc. 5. A report on Brown and McDonough's claim under Philip Robinson.

Defendant's List of Evidence, filed 21 *Feb.*, 1878.

McDONOUGH'S LEGATEES
vs. } 24.
THE UNITED STATES.

Deft.'s evidence:

1. Copy of petition in case McDonough vs. U. S., No. 41.
2. Copy of mandate of Sup. Court in do., (in papers No. 41.)
3. Copy of U. S. district court decree on filing mandate.

Note by the Clerk of Dist. Court.

The mandate of the Supreme Court in suit No. 41, old land docket, was filed Dec. 7, 1872.

The mandate directs the district court to enter a decree

79 for the United States in said cause.

Such decree has not and could not have been entered on 7 December, 1872; for, on examination of the minutes, it appears that on that day Judge Durell was confined to his room by illness and held no court, and as thereafter no move was made in the matter, the result is that no decree was ever entered on the mandate.

Submission, entered Feby. 21, 1878

McDONOUGH'S LEGATEES
vs. } 24.
UNITED STATES.

On motion of Geo. S. Lacey, U. S. atty., and upon filing written consent thereto, signed by Albert C. Janin, of counsel for opposing parties—

It is ordered that the above-entitled and numbered cause

80 be, and the same is hereby, taken under advisement upon the pleadings, evidence, and briefs.

Decree, entered 1 *April*, 1878.

McDONOUGH'S LEGATEES
vs. } No. 24.
UNITED STATES.

This case having been submitted on the pleadings and evidence, and it appearing from the evidence that the claim of Philip Robinson, under whom the petitioners hold, to a tract of land in the Greensburgh land district of Louisiana, and containing 2,100 arpents, equivalent to 1,785 acres, is a valid claim, under the act of

Congress of June 22, 1860, and that all of said land, with the exception of 432.35 acres, has been disposed of by the United States to other parties—

81 It is ordered, adjudged, and decreed that the petitioners have judgment against the United States for certificates of location or land scrip to the amount of 1,352.64 acres, to be located upon any of the public lands of the U. S. subject to private entry, at $1.25 per acre, under the 6th section of the act of Congress of June 22, 1860.

And it is further ordered, adjudged, and decreed that patents issue to the petitioners for the following-described tracts of land embraced in said claim and remaining undisposed of by the U. S., viz: the fractional N. E. ¼ sec. of sect. 9, containing 100 acres, and the W. ½ of the N. E. ¼ of sect. 10, containing 80 acres, both tracts lying in T. 8, S. R. 4 E., the S. E. ¼ of sect. 34, containing 155.24 acres, the S. W. ¼ of S. W. ¼ of sec. 34, containing 38.92 acres, and the fractional S. ½ of the N. W. ¼ of sec. 34, containing 58.90 acres, the latter two tracts lying in T. 78, R. 4 E., all in the Greensburg land district of Louisiana.

82 Judgment signed 5 April, 1878.

(Sig.) EDWARD C. BILLINGS, *Judge.*

Appeal granted April 6th, 1878.

McDONOUGH'S LEGATEES
vs.
THE UNITED STATES. } No. 24.

On motion of Geo. S. Lacey, U. S. atty., and on suggesting to the court that defendants are aggrieved by the decree herein rendered against them and in favor of the plaintiffs, on the 5th April, 1878, for United States certificates of location or land scrip for 1,352.60 acres and patents for $432\frac{35}{100}$ acres of land, and are advised that there is error therein to their prejudice, it is ordered that they be allowed an appeal to operate as a supersedeas, returnable to the next October Term of the Supreme Court of the United States.

Extract from the Minutes of 6 *April*, 1878.

83 (Here follows map, marked page 83.)

United States District Court in and for the District of Louisiana.

CLERK'S OFFICE.

I hereby certify that the foregoing 82 pages do form and contain a true and correct transcript of the originals on file, and of record, in the matter of McDonough's Legatees vs. The United States, numbered 24 of the new land docket of the said court, except plan marked Robinson B, which is hereto annexed in original as part of said transcript.

In faith whereof, I have hereto set my hand and the seal of our said court, at New Orleans, in said district, this 1 day of July, A. D. 1878.

[SEAL.] J. DEVONSHIRE, *Clerk.*

I, Edward C. Billings, U. S. judge for the district of Louisiana, do hereby certify that John Devonshire, whose genuine signature is affixed to the foregoing certificate, is and was, at the time of signing the same, the duly qualified clerk of the United States district court for said district; that full faith and credit are due and owing to all his acts as such, and that the said attestation is in due form of law.

Witness my hand and seal, at the city of New Orleans, in said district, this 1 day of July, A. D. 1878.

EDWARD C. BILLINGS, [L. S.]
Judge.

(Endorsed on cover:) Louisiana D. C. U. S. No. 796. The United States, Appellants, vs. McDonough's Legatees, the Cities of New Orleans and Baltimore. Filed 1st October, 1878.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

THE UNITED STATES, APPELLANTS,
vs.
McDONOUGH'S LEGATEES.
} No. 796.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

THE UNITED STATES, APPELLANTS,
vs.
McDONOUGH'S LEGATEES.
No. 796.

BRIEF FOR THE UNITED STATES.

This is a claim under a Spanish title, supposed to be covered by the eleventh section of the act of 1860, ch. 188 (12 Stats., 85), as extended by the act of 1872, ch. 421 (17 Stats., 378).

The petition of the appellees, the cities of New Orleans and Baltimore (filed November 9, 1872), states that they are universal legatees of one John McDonough who died in 1850, and that McDonough owned, among other property, the tract in question which in January, 1804, had been granted by one Estevan, commandant of the post at Galveston, to one Robinson, who, in November of the same year, conveyed it to McDonough and one Brown, the latter of whom subsequently transferred his interest therein to the former; that, under the act of April 25, 1812 (2 Stats., 713), McDonough and Brown presented their claim to the commissioner thereby

authorized, who reported thereon favorably; and that again, under the act of June 17, 1844 (5 Stats., 676), McDonough brought suit therefor, and recovered judgment below, such judgment being afterward (December term, 1853) reversed in this court, under the principle of Reynes' case (9 Howard, 127).

The transaction by which the land was conveyed to Robinson in 1804 was as follows:

Robinson preferred a petition to Estevan, stating that since 1797, under a permit from his predecessor, he had been in possession of the land (designating, and exhibiting a plan thereof) as a vacherie, but that his title papers had been subsequently burned with his house, and therefore he prayed for a renewal of the permit (folio 21). Thereupon was issued the following paper, which is that relied upon as giving title:

"GALVESTON, *January* 20, 1804.

"This party may continue in possession of the land settled with the permission of my predecessor, and will present himself to the intendancy-general to obtain his proper title.

"THOMAS ESTEVAN."

The answer of the United States (folio 56) makes no admissions, but requires proof of the title alleged, and submits that the title in Robinson, relied on by the petitioners, was wholly inchoate, and as such is not protected by the section of the act of 1860 cited therefor.

The proofs on behalf of the petitioners seem to be subject to observation, but as no objection was made

below, and those which now occur appear to be merely technical, I shall put the case of the United States upon the ground stated in the *memorandum for the court* below, signed by the counsel on both sides (folio 76), viz, that the title alleged is not within the eleventh section of the act of 1860.

The error assigned is that the court overruled this ground, and gave judgment for the petitioners.

The act of 1860, so far as necessary to develop the case of the United States, is as follows:

SECTION 1. That any person or persons, and the legal representatives of any person or persons, who claim any lands lying within the States of Florida, Louisiana, or Missouri, by virtue of *grant, concession, order of survey, permission to settle, or other written evidence of title*, emanating from any foreign government, bearing date prior to the cession to the United States of the territory out of which said States were formed, or during the period when any such government claimed sovereignty, or had the actual possession of the district or territory in which the lands so claimed are situated, shall be, and they are hereby, authorized to make application for the confirmation of their title to the lands so claimed, in the manner following, to wit: They shall file notices in writing, together with the evidence in support of their claims, before the commissioners hereinafter designated, within whose district the lands claimed may be situated, together with a brief abstract of the title of the claimant, and copies of the plats of survey thereof, whenever such surveys have been made and are within the possession of the claimant, and accompanied with a sworn statement by the claimant of the lands supposed to be covered by his claim, according to the legal divisions and subdivisions of the surveys made by the United States, if the land claimed is included in any surveys so made; and the said notices, evidence, and the decisions of the commissioners thereon, shall be recorded in a book kept for that purpose, a transcript of which shall, from time to time, be transmitted to the Commissioner of the General Land Office.

Section 2 constitutes the registers and receivers of the several land-offices, &c., commissioners to hear and decide, &c., and then to report to the Commissioner of the Land Office.

Section 3 requires the commissioners to report under three distinct classes (1), such claims as ought to be confirmed, where the lands have been in the *possession* of the claimants for a period of at least twenty years preceding the day of fixing the claim; (2) such as ought to be confirmed, but which differ from the first class in being accompanied by no actual *possession*, &c., for twenty years, &c.; (3) such as ought to be rejected, &c.

Section 4 requires the Commissioner of the Land Office, upon approving of the *reports* as to classes *one* and *two*, to report the same to Congress for its action, &c.

Section 5 provides that the Commissioner of the Land Office shall report to Congress all cases in which he disapproves of the action of the commissioners under the act.

Section 6 provides *lieu lands* where necessary.

Section 7 provides that certain records, &c., before previous commissioners, shall be received in evidence.

Section 8 requires that no lands claimed under the act shall be sold, &c., by officers of the United States until a final decision upon the validity of such claim, &c.

Section 9 contains a provision as to the fees payable by claimants.

Section 10 requires the Commissioner of the Land Office to report to Congress all proceedings under the act.

Section 11 is as follows:

That in any case of such a claim to lands as is hereinbefore in the first section of this act mentioned, *where the lands claimed have not been in possession and cultivated by the original claimant or claimants, or those holding title under him or them, for the period of twenty years aforesaid, and where such lands are claimed by complete grant, or concession, or order of survey duly executed, or by other mode of investiture of the title thereto in the original claimant or claimants, by separation thereof from the mass of the public domain, either by actual survey or definition of fixed natural and ascertainable boundaries or initial points, courses, and distances*, by the competent authority, prior to the cession to the United States of the territory in which said lands were included, or where such title was created and perfected during the periods while the foreign governments from which it emanated claimed sovereignty over or had the actual possession of such terri-

tory, the person or persons, his, her, or their heirs, devisees, legal representatives or grantees, so claiming such lands, may, at their option, instead of submitting their claim to the officer or officers hereinbefore mentioned, proceed by petition in any district court of the United States within whose jurisdiction the lands or any part of the lands claimed may lie, unless such claim comes within the purview of the third section of this act; to which petition the United States shall be made defendant, and it shall be verified by the oath of the party or parties, and conform to the provisions of section 1 of this act, and to the practice of such court in chancery, and the attorney of the United States for such district shall defend against the same for the United States; and the court shall decide the claim valid or invalid, according to the principles established in this act, and decree accordingly. If the decree be against the United States, an appeal shall be entered to the Supreme Court of the United States; and if it be against the claimant or claimants he or they may take an appeal directly to that court, as of right and course, without affidavit or security other than for costs; and the same shall be adjudged *de novo* in the Supreme Court as in other cases of appeals thereto in chancery, and as equity and justice and the principles aforesaid may require; which decision shall be final, and patent shall thereupon issue, if the claim be adjudged valid, for so much of the lands claimed as remain unsold; and for so much as may have been sold, the provisions of section 6 of this act shall apply and be in force.

Section 12 limits the act to a duration of five years.

I submit that the title alleged and shown by the petitioners, is within neither the *words* nor the *spirit* of the statute.

1. It is not within the words.

The title set up is *a permission to settle.*

"Permissions to settle" are expressly included in the first section of the act, but are left out of the enumeration of titles provided for in section 11. The specifications contained in the two sections are evidently deliberate, and the variations betwixt them must be considered as made *ex industria.*

2. The *spirit* of the act prohibits the consideration of such titles under section 11.

The method of obtaining a confirmation of title under section 1 is *political*, that under section 11 *judicial*.

Under the former, Congress is to be the final judge of the propriety of *confirming* the title. Consequently it therein allowed claims upon the Spanish Government that are very indefinite and irregular, to be renewed before itself, acting in the first place through commissioners appointed therefor. So far as the question is one of mere bounty it is reserved, as is reasonable, for the exclusive consideration of the legislature.

But section 11 allows certain claims to be presented to the *judicial* department of the government. It was to be expected that this course would suggest a limitation upon the class of claims so to be presented. Congress having reserved to itself all claims involving mere generosity, remitted to the courts only those of classes ordinarily cognizable by such tribunals.

The words of the first section taken in connection with those of section 3, "*number two*," show that Congress supposed that there might be presented to it, and favorably considered, cases of *permission to settle* followed by *a want of possession* by the claimant *for more than twenty years*. If there were such cases it proposed to hear them, and if otherwise meritorious, exercise in regard to them its sovereign bounty.

But section 11 *requires for all cases within its provisions the element of* A WANT OF POSSESSION OF AT LEAST TWENTY YEARS. It must, therefore, be maintained by the petitioners that it was the intention of Congress to give persons having a Spanish permission to settle *unaccompanied by settlement*, or *with settlement long disused*, an

advantage before the courts over those who possessed such imperfect titles *fortified by continued settlement.*

Nothing is said in the present record as to the *possession* of the claimants (or rather as to their *want of possession*) for twenty years. *It seems that such a statement is necessary to create jurisdiction under the eleventh section.* But however that may be, and whatever may be the *facts* thereabouts in this case, it is submitted that although nothing occurs as an objection to a jurisdiction *by Congress or its commissioners* over cases of permission to settle accompanied by a failure to exercise or a disuse of such possession, it would be an anomaly to confer upon a tribunal of justice jurisdiction over cases resting upon paper titles, the validity of which, upon their face, is conditioned upon the existence of facts which the act requires, or at all events allows, to be non-existent. In the judgment of a court of justice such a title (for all that appears to the contrary) is *felo de se.* It is *title* by a permission *not exercised;* by an occupancy *unenjoyed.* Such seems to be the view which tribunals controlled by technical trains of thought must take of such estates.

It is consequently submitted that under both the *words* and the *reason* of the statute, the judgment below should be reversed.

S. F. PHILLIPS,
Solicitor-General.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1878.

No. 796

THE UNITED STATES, APPELLANT,

vs.

McDONOUGH'S LEGATEES, THE CITIES OF NEW ORLEANS AND BALTIMORE.

BRIEF FOR APPELLEES.

EDWARD JANIN,
Of Counsel for Appellees.

Judd & Detweiler, Prs.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1878.

No. 796.

THE UNITED STATES, APPELLANT,

vs.

McDONOUGH'S LEGATEES, THE CITIES OF NEW ORLEANS AND BALTIMORE.

BRIEF FOR APPELLEES.

This suit was instituted in the District Court of the United States for the District of Louisiana, under the 11th section of the act of June 22, 1860, (12 Stat. L., 85,) extended for three years by act March 2, 1867, (14 Stat. L., 544,) and again extended for three years by act of June 10, 1872, (17 Stat. L., 378.)

The act of June 22, 1860, is entitled "An act for the final adjustment of private land claims in the States of Florida, Louisiana, and Missouri, and for other purposes."

The petition (Rec. 1) filed November 9, 1872, shows that the petitioners are the residuary devisees and legatees of John McDonough, deceased, and entitled, in undivided moieties, to all the decedent's right and interest in a tract of land, of about 2,100 arpents, situated in the former Spanish province of West Florida and present State of Louisiana, for which tract the commandant of the post of Galveston, in said province, issued a written permission to settle, January 20, 1804, to one Philip Robinson, who sold

the same by deed dated November 12, 1804, to John McDonough and Shepherd Brown; that the claim of McDonough and Brown for said land was presented to and recorded by the commissioner appointed under the act of April 25, 1812, (2 Stat. L., 713,) to receive and report upon land claims in Louisiana, west of Pearl river and east of the Mississippi; that said commissioner reported that the claim ought to be confirmed; that under the act of June 17, 1844, (5 Stat. L., 676,) McDonough, who, in the meantime, had acquired all the rights of said Shepherd Brown in said tract, instituted a suit against the United States upon said land claim, in the District Court of the United States for the District of Louisiana, said suit being numbered 41 of the Land Docket; that in his petition in said suit, filed June 15, 1846, McDonough alleged that the claim to said land had been confirmed [by act of Congress] to the extent of 1,280 acres, but that he was unwilling to accept said partial confirmation, and therefore sued for the confirmation of the whole; that judgment was rendered in said suit No. 41 in favor of claimant, but was reversed by the Supreme Court, [at its December term, 1853;] that the said tract of 2,100 arpents is equivalent to 1,786.47 acres; that out of the area of said tract there remain vacant 432.36 acres, and that $1,354\frac{11}{100}$ acres have been disposed of by the United States.

The answer (Rec. 18) avers, among other things, that the permission to settle issued to said Philip Robinson created a mere inchoate title, and that, under the 11th section of the act of 1860, the Court had no jurisdiction of such incomplete title, said section 11 conferring jurisdiction only over complete titles, and the act of 1860 giving to land commissioners exclusive jurisdiction over incomplete titles.

The answer further avers (Rec. 18) that McDonough acquiesced in the decision of the commissioner under the act of 1812, which admitted the validity of the claim to the extent of 1,280 acres, and is therefore bound thereby, and

is estopped from setting up claims to any larger quantity of land under the said titles, as are the plaintiffs also, who claim under him.

The judgment signed April 5, 1878, (Rec. 24, 25,) recites "that the claim of Philip Robinson, under whom the petitioners hold, to a tract of land in the Greensburgh land district of Louisiana, and containing 2,100 arpents, equivalent to 1,785 acres, is a valid claim, under the act of Congress of June 22, 1860, and that all of said land, with the exception of 432.35 acres, has been disposed of by the United States to other parties."

And thereupon it decrees certificates of location or land scrip to the amount of $1,352\frac{64}{100}$ acres, and patents for certain specified tracts of land in place.

The title papers to Robinson appear on pages 5 and 6 of the Record, and the translations on page 7.

Document E, No. 1, is a petition, dated District of Galveztown, Jan. 20, 1804, wherein Philip Robinson represents to Don Thomas Estevan, commandant, that he is an inhabitant of the district, and that he has been since 1797 in quiet possession of, and has used as a stock farm, a tract of land on the Bayou Gotohell, and *now resides thereon* with his family.

That he had established himself thereon at said time, (viz, 1797,) with the permission of Galvez's predecessor, but that *his petition and the permit of the commandant were unfortunately lost and destroyed by the burning of his house.*

That the adjoining lands *have been surveyed* in favor of Don Geronimo Lachiapella; that he fears encroachment upon his rights, and therefore begs the commandant to *renew* in his favor the *order* or *permit* of his (your) predecessor; the tract to be bounded on two sides by the lands of [surveyed for] said Lachiapella, on the north by the public domain, and on the south by the Bayou Gotohell; the depth to run from the bayou back to the end of Lachiapella's lines. Said tract

containing about 2,100 arpents, "as appears from the accompanying plan."

This plan is on page 7 of the Record.

On the petition is the following indorsement of the commandant, Estavan:

"GALVESTON, *Jan.* 20, 1804.

"This party may *remain* in the possession of the land *settled by him under the permit of my predecessor*, and he will apply to the intendant-general for his formal title.

"THOMAS ESTAVAN."

This document is dated a little more than two months prior to the act of March 26, 1804, (4 Stat. at L., 52,) by which the United States gave the first formal and distinct intimation of their claim that West Florida was embraced in the cession of Louisiana.

The grantee was directed to apply to the intendant-general for his formal title. It is well known that in 1799 the authority to issue formal titles to land was transferred from the governor-general of Louisiana and West Florida, to the intendant, Morales.

2 White's New Compilation, 478.

U. S. *vs.* Moore, 12 How., 219.

Galveztown was a settlement in West Florida, (2 Martin's Louisiana, p. 77,) and was established in 1778, (2 Martin, 43.) It apparently took its name from Don Bernardo de Galvez, governor-general of Louisiana.

The evidence of the foregoing petition and order was a copy thereof, certified by the clerk of the Supreme Court of the United States, to be a true copy of document E No. 1, appearing in the Supreme Court transcript of record on appeal of suit No. 41 of the land docket, in the United States district court for Louisiana, and made part of the petition of John McDonough in said suit. (Rec., 6.)

This suit, and the appeal to the Supreme Court from the

judgment, and the decree of the Supreme Court on said appeal, are stated in the answer herein (Rec. 18); and the mandate of this Court was filed in evidence by the defendants. (Rec., 21.)

The suit was under the act of June 17, 1844, (5 Stat. L., 676,) and upon the same identical cause of action as the present suit, and the appeal was heard at the December term, 1853, and the judgment was reversed, without opinion, on the grounds stated in United States *vs.* Reynes, 9 How., 127. The record is in volume one of the bound transcript of records of the Supreme Court for December term, 1853, commencing at the page marked (in ink) 293.

The papers filed in that suit as "Doc. E., No. 1," were the original papers, and the signature of Estevan was proved therein.

The evidence of these papers (consisting of the copy aforesaid, certified by the clerk of the United States Supreme Court,) was admitted without objection.

The necessity for resorting to this mode of proof is explained in the affidavit of Louis Janin. (Rec. 5.)

Mr. Janin deposes (8th December, 1872,) that he is counsel for the city of Baltimore in the present suit; that he, with the assistance of the officers of the court, has made diligent search for the original of document E, No. 1, filed in the suit No. 41 aforesaid, under the act of 1844, but has been unable to find it; that the said original papers were recorded in the office of the clerk of the commissioner of land claims west of Pearl river and east of the Mississippi, in liber F, folio 418. That the records of said commissioner have, within a few years, been deposited in New Orleans. That as appears from an original certificate, put on record many years ago, of one of the former commissioners of the Greensburgh land office, the record of said original papers had many years ago been accidentally destroyed.

That the claim of Brown and McDonough, under Philip Robinson, for this land was presented to the commissioner

west of Pearl river, will appear from the certificate (Rec., 8) of the United States surveyor general for Louisiana, and by reference to page 53 of American State Papers, Public Lands, vol. 3., Duff Green's edition.

The land commission for the district west of Pearl river was established by the act of April 25, 1812. Section four of that act required that all written evidences of title should, under serious penalties, (of never thereafter being admissible in evidence, etc.,) be delivered to the commissioner; and provided that his clerk should record them in the books to be kept for that purpose.

Section seven of the act of June 22, 1860, (12 Stat. L., 87,) provides that such records shall be evidence, and this court held at the last term that certified copies of the record were likewise admissible.

Nos. 668 and 1046. October Term, 1877.

No. 668. The United States, appellant, *vs.* The Heirs of John Watkins.

No. 1046. Melanie Bringier, widow of William Simpson, appellant, *vs.* The United States.

The opinion (one in the two cases) is not yet reported.

In the present case, the record of these papers having been long ago accidentally destroyed without any fault of the parties interested, and the originals having been lost out of, or mislaid in, the clerk's office of the United States district court, where they were filed in 1846, in land suit No. 41, the most unexceptionable means of proving them left to us was from the transcript on appeal from the judgment in that suit No. 41, which was in favor of the then petitioner.

If any other means existed, we were not put to it, as the evidence was not objected to.

There is no just ground for suspicion in regard to the allegation of destruction of Commissioner Cosby's record of this claim; the records of many other claims were also destroyed; for Mr. Cosby was an almost inconceivably

careless man, as will be seen from Senate Doc. No. 885, 1st session, 18th Congress, printed in vol. 3, p. 550; Pub. Lands, Duff Green's edition. It is a letter and accompanying documents, addressed by the General Land Office, under date of December 22, 1823, to the Senate, in explanation of the "causes of the delay in adjusting the land claims in the district of St. Helena, in Louisiana."

He shows that the pay allowed the register and receiver, who, under the act of March 3, 1819, (3 Stat. L., 528,) succeeded to Cosby as land commissioner, was so inadequate that it was difficult to keep the offices filled, and he appends a number of letters from James M. Bradford, the register, which show a state of affairs that makes it rather to be wondered at that any of the records have been preserved.

In the first letter, (Pub. Lands, vol. 3, 551,) dated Nov. 5, 1822, after stating that upon Cosby's death the books of his office [the commissioner's] had been taken possession of by the parish judge, he concludes:

"Mr. Skipwith accompanied me to the house of Mr. Herault, [Cosby's clerk,] where I found a mass of confusion which I am incompetent to describe. One of the registers, made out by James O. Cosby, first commissioner, has, as I understood from both Mr. Skipwith and Mr. Herault, *been missing since* 1814, *and was in that year accidentally burnt.* I found from twelve to eighteen bundles of papers, wrapped up in old newspapers, except the ends, which were exposed without order or method, and the balance of the papers of the office carelessly thrown into two trunks, rumpled, twisted, and pressed down as if of no value, etc."

In his next letter, dated Baton Rouge, La., November 15, 1822, he says (at the end, on page 552:)

"I cannot but feel the embarrassment the commissioners will labor under from the loss of the register which I mentioned in my last, nor can I now perceive any remedy but to call upon claimants to reproduce their claims, and such as are lost to have recorded anew."*

*At the date of this letter the claim of Brown and McDonough had already been reported by Cosby and acted upon by Congress; therefore, and as they had the originals, they had no cause to obey such a call if it was ever made.

In the letter of June 14, 1823, p. 552, he says:

"Great are the complaints of neglect in my predecessor, many of which I trust are unfounded, whilst some I know to be too just."

In a letter of July 8, 1823, signed by the Register and Receiver, they say, page 552:

"You were informed by the register, immediately after his appointment, of the wretched condition of the office, and the labor and embarrassment it has produced is indescribable. We could find nothing to guide us. We were compelled to take the office out of chaos and point out a course for our government."

In a letter of 29th October, 1823, p. 553, the same officers write:

"We have neglected hitherto to inform you that the list of settlement claims forwarded for confirmation by James O. Cosby is destroyed. This information was communicated to the present receiver by the late Charles S. Cosby." * * * * "The register having come to a determination to resign his appointment on the 22d of December next, we have thought proper to suggest it now, that the vacancy may be filled as early thereafter as may be." * * * * "We cannot close this letter without suggesting to you the perilous condition of this office. Compelled under the law to keep it at this place, we have selected the safest house for it in the place, as we conceive. *The building is of wood, and liable every hour to be destroyed by fire.* The salary will not justify either of us in leaving our plantations and making a residence here; nor can we employ a person to take charge of the office. If we were allowed a clerk we could require him to sleep in the office for its security."

The petition herein avers (Rec. 1) that the cities of New Orleans and Baltimore, the petitioners, "are the joint proprietors, each for one undivided half," of the tract granted to Robinson, and contains an extract from McDonough's will, whereby he made the two cities his residuary devisees and legatees.

The fact so averred was proved to the satisfaction of the

judge, or must have been admitted in argument or tacitly, since the judgment was rendered for everything claimed by the cities.

But the evidence filed in proof seems to require an explanation, which we proceed to give.

In the first place, your honors will find on pp. 367–415 of 15 Howard, the report of the case of The Executors of John McDonough, deceased, and others, *vs.* Mary Murdoch and others, heirs of John McDonough, deceased, on appeal from the Circuit Court of the United States for the Eastern District of Louisiana, in which case this Court sustained McDonough's devise and bequest to the two cities.

In the next place, your Honors will remember that at the December term, 1873, this Court affirmed the judgment of the United States District Court for Louisiana in favor of the cities of New Orleans and Baltimore, as residuary devisees and legatees, under the will of McDonough, in a land suit against the United States, brought like this one, under the 11th section of the act of June 22, 1860.

The judgment was partly in favor of and partly adverse to the claimants, and there was an appeal by the United States and a cross-appeal by the cities. The appeal of the United States was No. 186 of December term, 1853, and the cross-appeal was No. 187.

The judgment below was affirmed in *toto*. That suit did not embrace the present claim. But the title asserted in the two cities therein stood upon precisely the same grounds as the title of the petitioners in the present suit. The record therein is in the bound volume No. — of transcripts for December term, 1873, beginning at the page numbered in ink ——.

In that suit J. W. Gurley, Esq., Assistant District Attorney of the United States, signed an admission in writing, (see pages 7 and 8 of the printed record therein,) which appears to have been indorsed on the petition, to the effect that—

"The part of the will of John McDonough by which the plaintiffs (who were in that suit, as in the present one, the cities of New Orleans and Baltimore) are instituted universal legatees, and the probate of said will are correctly set forth in the petition, and in accordance with the statements of the opinion of the Supreme Court of the United States in the case of McDonough's Executors *vs.* Murdoch *et al.*, reported in 15 Howard, 367, and 20th Curtis' edition, 564."

(Signed) "J. W. GURLEY,
"*Asst. U. S. Atty.*"

Now, the petition in the present suit contains the same statement in respect to the will of McDonough as the petition on which said admission was indorsed; and hence, to prove the statement in the present petition, the petition in that former suit, with the aforesaid admission, was filed herein. The former petition was filed February 16, 1870, numbered nine, and appears in the record, pp. 9–17, and the admission appears on page 17 of the present record.

But in that suit No. 9, one of the claims sued on, to wit, for 120,000 arpents, had been conveyed by Geronimo Lachiapella, the grantee thereof, to John McDonough and Shepherd Brown, just as, in the present case, the claim of Philip Robinson was conveyed to the same McDonough and Brown. In the suit No. 9 the record contains full evidence to support the averment in the petition therein, (page 3 of the printed record:)

"That on the settlement of the partnership existing between the said McDonough and Brown, the said one hundred and twenty thousand arpents became the exclusive property of said John McDonough, as will be proved by notarial acts and judicial proceedings."

These "notarial acts and judicial proceedings" occupy some thirty-six printed pages of the Supreme Court record of that suit No. 9 of the new land docket of the district court, and Nos. 186 and 187 of the docket of

the Supreme Court for December term, 1873. They run from page 67 to page 103 of that record. They consist of certified copies of the will of Shepherd Brown, and the probate thereof, of *consent judgments* between Brown's legatees and McDonough, by which they renounced all rights under the will, in consideration of certain amounts to be paid by McDonough, the surviving partner of Brown and McDonough, and of notarial copies of transfers by Brown's legatees and heirs to McDonough, etc. The judgment of the district court on this Lachiapella title was in favor of the two cities, residuary legatees of McDonough, and was affirmed by the Supreme Court.

Now, all this evidence must have been very expensive. When the United States loses a case, under the act of 1860 its law officers are commanded to appeal. The cost of making out the transcript and of printing it falls on the Government. Mr. Gurley, who was assistant district attorney when suit No. 9 was tried, was such when the present one was instituted and tried, and signed the answer, (Rec., 17, 18); and the evidence was all on file in the clerk's office.

It would have been a waste of the money of the United States to compel the petitioners herein to file all that evidence in the present case, and Mr. Gurley did not do it. He virtually admitted the fact of the transfer of Brown's share to McDonough, his partner, by the "memorandum for the court" (Dec., 23) signed by him and counsel for petitioners, and which reads:

"The question in this case is, whether under the eleventh section of the act of June 22, 1860, (12 Stat. at Large, p. 85,) the court has jurisdiction, the defendants contending that plaintiffs had merely a permission to settle; that this was no divestiture of title from the government of Spain, and that under said act the land commissioners alone had jurisdiction over such cases."

The interest involved herein is so small that, through in-

advertence, Mr. Gurley was not requested to formally admit the fact. Had he been requested to do so, we have no particle of doubt that he would have consented.

The same objection to the jurisdiction is set up in the answer (Rec. 18) as in the memorandum. The 11th section of the act of June 22, 1860, (12 Stat. L., 85,) confers jurisdiction "in any case of *such* a claim to lands as is hereinbefore in the first section of this act mentioned," (said first section including "permission to settle,") where such lands are claimed by *any* mode of investiture, including the mode by "definition" "of initial points, courses, and distances," by the competent authority, or by a sovereign *de facto*. The words in connection with the reference to a "sovereign *de facto*" *are*: "or where *such* title was created and perfected during the period while the foreign government from which it emanated claimed sovereignty over *or* had the actual possession of such territory."

The word "perfected" must be understood with close reference to the distinguishing characteristics of the various descriptions of titles, enumerated in the first section of the act, and incorporated by reference in the 11th section. These descriptions of title are "grant, concession, order of survey, permission to settle, or other written evidence of title." A permission to settle is sufficiently "perfected" if if it is so *as* a permission to settle. The permit to Robinson was "perfected during the period while the foreign Government from which it emanates claimed sovereignty over *or* had the actual possession of such territory," for Robinson inhabited and used the tract as a stock farm from 1797, and the land commissioner west of Pearl river (see 3 Pub. Lands, Duff Green edition, p. 53,) reported it as inhabited and cultivated from 1809 to 1814. It is perfectly known that Spain had the "actual possession" of this territory until 1810 at least, and she "claimed sovereignty" until the treaty of 1819. (See United States *vs.* Lynde, 11 Wall., 632.)

* The answer claims that the jurisdiction under Sec. 11, act of 1860, is confined to *complete* grants; and yet the Morales grant to Lynd (11 Wall., 632) was certainly not a complete grant under the definition in Fremont's case, (17 How., 554,) for, without the action of our Government in the act of 1860, it had no validity at all, and even under that act addressed itself solely to the *bounty* of the United States.

These views receive support from a passage in a letter of the Commissioner of the Land Office, to the Register and Receiver at St. Helena, Louisiana, dated August 13, 1823, and found on pages 717–722 of Part 2 of Land Laws, Opinions and Instructions. The extract is on page 719. The commissioner is discussing the act of March 3, 1819, (3 S. L., 528,) by which the Robinson claim was confirmed for 1,280 acres, and says:

"The principles recognized by this act, in confirming private claims founded on written evidence, *are in conformity to the principles* on which similar claims in the other land districts within the State of Louisiana and Mississippi have been confirmed, and the distinguishing character of which is, that no claim founded on any order of survey, requette, *permission to settle*, or any written evidence, should be *confirmed as a complete title*, *unless* it was derived from the Spanish, British, and French Governments, previous to the day on which their respective authorities over the domain was considered to have ceased, and *unless* actual settlement was made on the land previous to that period; but in all other cases, when the written evidence appears to have been fairly obtained, the lands have been confirmed as *donations*, to an extent not exceeding 1,280 acres."

It is clear that under the principles that had been always, prior to the act of 1860, applied by Congress in the confirmation of Spanish titles, a *permission to settle* was treated as a *complete title*, provided it was made prior to the cessions, etc., or in the words of section 11 of the act of 1860, "by the competent (*de jure*) authority."

But the characteristic of the act of 1860 is, that it, for the first time, put grants by *de facto* governments upon the same footing of validity as those by *de jure* governments; and hence a permission to settle, fairly obtained from a *de facto* authority, and accompanied by possession, etc., has the same character as a *complete* title under the act of 1860, as the same title would previously have had if issued by a *de jure* authority.

It was said by this Court, in McMicken *vs.* The United States, No. 391, October term, 1877, (not yet reported):

"We do not understand that the act of 1860 was intended to make any claims valid which would not have been so before, if the government making the grant had had the right to make it. *The objection of want of title in the granting power was removed by the act as to all grants made by a government in possession* which were otherwise sustainable on the principles of justice and equity; the time for presenting claims was opened and extended; and actual surveys were dispensed with where the land could be otherwise identified."

There could certainly be no difficulty in identifying the Robinson tract without a survey, since it was bounded on one ~~two~~ sides by a bayou, and on two others by land already surveyed for Lachiapella, and the lengths of the side lines were stated in the plan accompanying Robinson's petition to Estavan. The permission by Estevan was issued in January, 1804, but the petition stated a possession since 1797, under a permission which had been destroyed by fire. Estavan's order reads that "the party" may *remain* in the possession of the land settled by him under the permit of my predecessor.

The facts stated in the petition and permit must be taken as true.

The claim was reported in favor of Brown and McDonough by the commissioner, (James O. Cosby,) west of Pearl river, under the act of April 25, 1812, (2 Stat. at L., 713.) The report of the commissioner is found in Am. State Papers, Pub. Lands, vol. 3, page 53, under No. 306, (Rec. 8.)

Congress confirmed the claim to the extent of 1,280 acres, by section 2 of the act of March 3, 1819, (3 Stat. at L., 528,) providing that such claims as this "shall be entitled to a grant as a *donation*," but not for more than 1,280 acres to any one person.

Congress apparently had not before it, or if it had, did not notice the evidence that Robinson had had a written

permission to settle, derived from the Spanish Government before the 20th of December, 1803, which permission, however, was destroyed by fire, and was replaced by Estevan's permission, dated January 20, 1804.

For the same second section of the act of March 3, 1819, provides that such titles (when accompanied by inhabitation on or before December 20, 1803,) "shall be confirmed as if the title was complete."

McDonough declined to accept the partial confirmation. He so declared in his petition on this title in suit No. 41, under the act of 1844, in which the judgment of the district court in his favor was reversed in the Supreme Court at the December term, 1853. There is no evidence that he did accept the benefit of this partial confirmation, nor that he ever applied for or received a certificate of the confirmation, or that such a certificate was ever issued, nor that he ever caused a survey to be made. It was for the defendants herein to show the fact if he had done so. There could have been no difficulty in doing so, since the records of the United States land office at New Orleans would have shown the issuance of a certificate or patent to him.

Brown and McDonough considered they were entitled to a confirmation of nearly eighteen hundred acres (twenty-one hundred arpents) as a *right*, and were not willing to accept twelve hundred and eighty acres as a *donation* in full settlement. Had they accepted the twelve hundred and eighty acres they would have been cut off from the present suit. But they did not accept the donation, and never took any benefit from it.

He cannot be considered to have forfeited any right by submitting to the jurisdiction of the commissioner west of Pearl river, under the act of April 25, 1812. That act conferred no authority upon the commissioner to adjudicate any claim. He was only to make report thereon. McDonough and Brown could not be expected to foresee what the decision of Congress would be, as no principles were

laid down in the act of April 25, 1812. (2 Stat. L., 713.) The action of Congress was not that of a judicial tribunal. Its proceedings were *ex parte* in their character.

The plan "Robinson B" (Rec., 25) shows that the judgment herein is correct in its figures as to the quantity of land disposed of by the United States, and in its description of the tracts remaining vacant, and for which it directs patents to issue.

The copy certified by the United States surveyor general for Louisiana (Rec., 8) from the State papers (Pub. Lands, vol. 3, page 53, Duff Green's edition,) is not correct under the heading of "Inhabited and Cultivated."

The dates should be 1809, 1814. That is, those are the dates as given in the volume referred to. It may be, however, that the United States surveyor general had the original report before him, and that the figures thereon are 1803, 1804, as his certificate (Rec., 8) represents them. Possibly, the dates are misprinted in the State Papers on Public Lands. The point seems to be of little consequence.

The counsel who managed this case below seem to have considered it unnecessary to give proof otherwise than by this certificate of the conveyance from Robinson to Brown and McDonough. The conveyance had been proved in the same court, in the suit, Land Docket No. 41, instituted by McDonough under the act of 1844, and appears in the transcript of record on appeal in that case, in the bound volume No. 1 of transcripts for December term, 1853, p. 293.

The fact of a transfer from Robinson to Brown and McDonough is shown by the report of the commissioner, and twelve hundred and eighty acres of the tract was confirmed to *them* by section two of the act of March 2, 1819. And the fact seems to have been tacitly admitted on the trial of this case.*

We ask the affirmance of the judgment.

Respectfully submitted,

EDWARD JANIN,
Of Counsel for Appellees.

* Section 4, act of April 25, 1812, (2 S. L., 715,) required that all evidences of title in the party presenting a claim, including *conveyances*, should be recorded by the commissioner's clerk.

Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 796.

THE UNITED STATES, APPELLANTS.

vs.

McDONOUGH'S LEGATEES, THE CITIES OF NEW ORLEANS AND BALTIMORE.

REPLY OF APPELLEES.

The brief for the United States raises a point as to the jurisdiction, viz.:

That to create jurisdiction under Sec. 11 of the Act of June 22, 1860, it is essential that the petition should contain an averment that the land claimed has *not* been in "in possession of and cultivated by the original claimant or claimants or those holding title under him or them for the period of twenty years aforesaid." (See Sec. 11, Act of June 22, 1860, 12 Stat., p. 87.)

We suppose this point may be considered as conclusively settled against the appellants, by the fact that no such averment is to be found in the petition in any of the following cases, in which, nevertheless, the Supreme Court has decreed certificates of location or scrip, viz.:

U. S.	*vs.*	Lynde	Dec. T.,	1870, (11 Wall.,	p. 632.)
"	"	Reynes	"	1872,	No. 370
"	"	Kenner	"	1873,	" 144
"	"	Leonard	"	"	" 145
"	"	F. Peniston & A. Duplantier	"	"	" 146
"	"	C. Cushing	"	"	" 147
"	"	Marigny	"	"	" 158
"	"	Power	"	"	" 159
"	"	De Armas	"	"	" 160
"	"	Trudeau	"	"	" 185
"	"	Cities of Baltimore and New Orleans	"	"	" 186
"	"	Johnston	"	"	" 246
"	"	Garcia	Oct. T.,	1876,	" 294
"	"	Bouligny	"	1877,	" 413

The 11th section lays down rules as to the form of the petitions. It provides that the petition shall make the United States defendants, that it shall be verified by oath, and that it shall "conform to the provisions of section 1 of this act, and to the practice of such court in chancery."

The provisions of section one (conformity to which is thus required) are that "they [the claimants under the act] shall file notices in writing, together with the evidence in support of their claims, before the commissioners hereinafter designated, within whose district the lands claimed may be situated, together with a brief abstract of the title of the claimant, and copies of the plats of survey thereof, whenever such surveys have been made and are within the possession of the claimant, and accompanied with a sworn statement by the claimant of the lands supposed to be covered by his claim, according to the legal divisions and subdivisions of the surveys made by the United States, if the land claimed is included in the surveys so made."

In all this there is no requirement that the petition to the court shall contain an averment of *non*-possession and *non*-cultivation, or of either of the two facts.

In the phrase (sec. 11) "where the lands claimed have not been in possession and cultivated by the original claimant or claimants, or those holding title under him or them, for the period of twenty years *aforesaid*," this last word "*aforesaid*" refers back to subdivisions *one* and *two* of section 3. This section 3 provides that claims presented to *commissioners* (and not to the district court) shall be by them subdivided into two classes:

"*Number one* shall contain all claims which, in their opinion ought to be confirmed, where the lands claimed have been in possession and cultivated by the *private* claimants or those under whom they derive title, *for a period of at least twenty years preceding the date of filing the claim*, by virtue of some grant, concession, or order of survey, *permission to settle*, or other written evidence of title emanating from some foreign government which held or *claimed* sovereignty or jurisdiction over the territory in which the lands claimed are situated, and where the *title* emanating from such foreign government *bears date anterior to the cesssion of said territory to the United States.*

"*Number two* shall contain all claims which, in their opinion, ought to be confirmed, where the lands are claimed under written evidence of title, *as above provided* in class *number one*, but where there has been no actual possession and cultivation of the land claimed *for a period of at least twenty years prior to the filing of the claim.*"

Now, these facts of *non*-possession and *non*-cultivation are essentially negative in their character—facts of which, in the way things go on in this world, it is impossible to furnish anything like really satisfactory proof, while, on the contrary, the opposite facts, viz., that the land *had* been possessed and cultivated, is perfectly susceptible (if they exist) of the most direct and positive proof. It belongs, consequently, to the *defense* to prove such facts. And as the petitioners cannot be expected to *prove* them, so neither are they required to *alleye* them.

Of course, however, if it should appear in evidence in any way "that there had been possession and cultivation by" the

original claimant or claimants, or those holding title under him or them for the period aforesaid," the jurisdiction of the court would be *ousted* and the petition would be dismissed.

But an examination of the act will show that it intended to *deny* to the commissioners jurisdiction of any written title granted *subsequent* to the cession to the United States, (see sec. 3,) and to confine jurisdiction over those titles to the courts of the United States. Such were all the Morales titles on which this Court has decreed scrip or certificates of location under the act of 1860, commencing with that of Lynde, (11 Wall., 632,) in which case your honors were obliged to hold that West Florida to the Perdido was included in the cession of Louisiana, which took place April 30, 1803, while the grants of Morales in that territory were made subsequently to that date. And, as was said by this Court in the same case, "the act of March 26, 1804, (2 Stat. L., 283,) organizing territorial governments for Louisiana, expressly declared void all grants made in the territory above referred to after the treaty of St. Ildefonso." And moreover section 14 of this act of 1804 (2 Stat. L., 289) prohibits settlement upon any lands of the United States in said territory, under penalty of fine and imprisonment, and authorizes the use of military force to remove persons attempting such settlement.

Thus, it appears to us, the requirement of an averment of *non*-possession and *non*-cultivation would amount to a requirement that a claimant should aver *on oath* that neither he nor his co-petitioners, nor their predecessors in interest, have committed a crime.

And, perhaps, it may properly be said that there is a legal presumption (operating to sustain the jurisdiction) that neither the petitioners nor their predecessors have, for the "period of twenty years," been criminally violating the prohibitions of the act of Congress of March 26, 1804.

Another point raised by appellants, both in the court

below (see "memorandum" in the record, p. 23,) and in their brief here, is that the eleventh section of the act of 1869 confers no jurisdiction upon the district court over titles consisting merely of a written "permission to settle."

The "permission to settle" in this case is dated in 1804, long after the cession of West Florida to the United States, (as this Court is obliged to hold, and did hold, in U. S. *vs.* Lynde, 11 Wall, 632.) It is clear, therefore, under the express words of section three of the act of 1860, that the commissioners have no jurisdiction of this title. For jurisdiction is allowed them *only* "where the title emanating from such foreign government bears date *anterior* to the cession of said territory to the United States." The jurisdiction of the commissioners is *confined* to such *anterior* titles.

Now, it is undeniable that the act of 1860 does confer jurisdiction somewhere, over written permissions to settle, emanating from a foreign government, and bearing date during the period while such government had the actual possession of and claimed sovereignty over the territory in which the lands claimed are situated.

That is unmistakably provided in the first section. And the description of the titles over which jurisdiction is given by the act, and contained in section one, is certainly incorporated into section eleven, which gives jurisdiction to the district courts, and of which the first words are: "That in any case of *such* a claim to land *as is hereinbefore, in the first section of this act, mentioned*," etc. The language of section one of the act of 1860 (12 Stat. L. 85,) is as follows:

"That any person or persons, and the legal representatives of any person or persons, who claim any lands lying within the States of Florida, Louisiana, or Missouri, by virtue of grant, concession, order of survey, *permission to settle*, or other written evidence of title, emanating from any foreign government, bearing date prior to the cession to the United States of the territory out of which said States were

formed, *or* during the period when any such government claimed sovereignty, *or* had the actual possession of the district or territory in which the lands claimed are situated," etc.

And as the commissioners have no jurisdiction over the permission to settle in this case, because it is dated in 1804, (Jan. 20, rec. 6, 7,) after the cession of the territory to the United States, the jurisdiction over this title, certainly existing somewhere under the act, *must* repose in the courts.

In United States *vs.* Lynde your Honors said, (11 Wall, 647:)

"What range of discretion was intended to be conferred upon the special commissioners and the courts by authorizing them to decide, according to the *principles of equity and justice*, is, perhaps, not entirely clear. If it should appear that a grant was obtained by fraud, or was affected by any other special vice, it would be the duty of the tribunals to reject it. Or, if it should appear that a claim was honest and meritorious, but defective in point of form and *completeness*, it might be the duty of the tribunals to sustain it as an *equitable*, if not a strictly legal title."

This *dictum* is certainly in full accord with the universal doctrine that a *remedial* statute is to be liberally construed. No such statute ever deserved a more liberal construction than that of June 22, 1860, which devolved upon the courts the welcome task of ordaining reparation for long continued wrong, while enabling them to avoid any condemnation of the previous action of our Government.

Respectfully submitted,

EDWARD JANIN,
Of Counsel for Appellees.